Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

No. 01-434

IN THE

Supreme Court of the United States

TRANSOCEAN TERMINAL OPERATORS, INC.,

Petitioner,

v.

FRANK TAYLOR, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH COURT OF APPEAL

BRIEF OF SIGNAL MUTUAL INDEMNITY ASSOCIATION LTD. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

GRAY H. MILLER
Counsel of Record
STEVEN L. ROBERTS
FULBRIGHT & JAWORSKI L.L.P.
Attorney for Amicus Curiae
1301 McKinney Street
Suite 5100
Houston, Texas 77010
(713) 651-5151

169919

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 5

I. An Intentional Injury Inflicted By A Longshoreman Against A Co-Employee Is Compensable Under The LHWCA 5

II. A Claim That One Longshoreman Injured A Co-Employee Is Not A Claim Of Intentional Injury By The LHWCA Employer And Is Within The Immunity Granted To The Employer By The LHWCA 12

Conclusion 16

Appendix — List of Members of Signal Mutual Indemnity Association Ltd, Effective October 5, 2001 ..... 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313 (D. Me. 1981) 14

Bazley v. Tortorich, 397 So. 2d 475 (La. 1981) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Daniels v. Swofford, 286 S.E.2d 582 (N.C. App. 1982) 15, 16

Davis v. Department of Labor and Indus. of Washington, 317 U.S. 249 (1942) 6

Dillon's Case, 324 Mass. 102, 85 N.E.2d 69 (1949) 8

Hartford Accident & Indem. Co. v. Cardillo, 72 App. D.C. 52, 112 F.2d 11, *cert. denied*, 310 U.S. 649 (1940) 8

Houston v. Bechtel Assocs. Professional Corp., 522 F. Supp. 1094 (D.D.C. 1981) 14

Jackson v. Frisard, 685 So. 2d 622 (La. App.), *writ denied*, 689 So. 2d 1386 (La. 1997), and *writ denied*, 689 So. 2d 1387 (La. 1997) 11

Cited Authorities

	Page
Johnson v. Odeco Oil & Gas Co., Inc., 679 F. Supp. 604 (E.D. La. 1987), *aff'd*, 864 F.2d 40 (5th Cir. 1989)	14
Kielczewski v. Washington Post Co., 8 Ben. Rev. Bd. Serv. 428 (1978)	9
Malbrough v. Halliburton Logging Serv., Inc., 710 So. 2d 1149 (La. App.), *writ denied*, 720 So. 2d 1217 (La. 1998)	12
Maryland Casualty Co. v. Cardillo, 69 App. D.C. 199, 99 F.2d 432 (1938)	8
Penker Const. Co. v. Cardillo, 73 App. D.C. 168, 118 F.2d 14 (1941)	8
Rupert v. Todd Shipyards Corp., 239 F.2d 273 (9th - Cir. 1956)	7
Rydeen v. Monarch Furniture Co., 240 N.Y. 295, 148 N.E. 527 (1925)	7
Sharp v. Elkins, 616 F. Supp.1561 (W.D. La. 1985)	14
Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917)	6

Cited Authorities

Page

Southern Pac. Co. v. Sheppeard, 112 F.2d 147 (5th Cir. 1940), *aff'g*, 29 F. Supp. 376, 378 (S.D. Tex. 1939) 9

Taylor v. Transocean Terminal Operators, Inc., 785 So. 2d 860 (La. App. 2001) 3

Uglem v. Foss Launch & Tug Co., 541 F.2d 1378 (1976) 7

Verschleiser v. Joseph Stern Son, Inc., 229 N.Y. 192, 128 N.E. 126 (1920) 7

Whittington v. Moore McCormack Lines, Inc., 196 F.2d 295 (2d Cir. 1952) 7

Williams v. Healy-Ball-Greenfield, 15 Ben. Rev. Bd. Serv. 489 (1983) 9

Statutes – Federal:

33 U.S.C. § 901, *et seq.* 1

33 U.S.C. § 902(2) 6, 10, 15

33 U.S.C. § 903(c) 11

33 U.S.C. § 905(a) 3, 5

33 U.S.C. § 905(b) 5

Cited Authorities

Page

43 U.S.C. § 1333 2

43 U.S.C. § 1333(b) 13

Statutes – State:

LSA – R.S. § 23:1032B (West 1998) 10

LSA – R.S. § 23:1035.2 (West 1998) 6

Court Rule:

United States Supreme Court Rule 10(b) 3

Other Authorities:

6 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, Ch. 103 (2000) 12, 13, 14, 15, 16

UNITED STATES DEPARTMENT OF LABOR, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, SPECIAL FUND ANNUAL ALLOCATION REPORT (2000) 1

INTEREST OF AMICUS CURIAE

Amicus Signal Mutual Indemnity Association, Ltd. (the Association)[1] is an association of approximately 170 companies[2], which are employers subject to the coverage of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq*. The Association's members have payrolls subject to the LHWCA totaling about $1.2 billion annually, and the members paid about $33.7 million of the total $358.6 million of compensation and benefits paid under the LHWCA in calendar year 2000.[3]

This brief is submitted on behalf of diverse interests in the nation's maritime industry, including stevedores, ship and barge owners and repairers, marine construction firms, ship agents, surveyors and a variety of other longshore and harbor worker employers covered by the LHWCA. In addition, this brief is submitted on behalf of numerous employers in the offshore energy industry, including service and supply companies covered by the LHWCA pursuant to the

---

1. Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae, made any monetary contribution to the preparation of submission of this brief. All parties have consented to the filing of this brief, and letters evidencing their consent are on file with the Office of the Clerk of this Court.

2. Addendum A to this brief lists the individual members of the Association.

3. UNITED STATES DEPARTMENT OF LABOR, DIVISION OF LONGSHORE AND HARBOR WORKERS' COMPENSATION, SPECIAL FUND ANNUAL ALLOCATION REPORT (2000).

Outer Continental Shelf Lands Act, 43 U.S.C. § 1333. The Association has a vital interest in the uniform and correct interpretation and application of the LHWCA.

The Association will address the substantive question presented by the petitioner, whether LHWCA immunity bars a claim for civil damages alleging an LHWCA employer is vicariously liable for injuries sustained when one longshoreman stabbed a co-employee in the course and scope of employment. The decision of the Louisiana Fourth Court of Appeal finding no immunity is a significant departure from prior federal decisions and threatens to upset the balance struck by Congress in requiring LHWCA employers to pay compensation and benefits without fault, in return for immunity from claims for civil damages. This state appellate court decision is in conflict with every federal decision that has ruled in this exclusively federal realm.

The Association will not address the issue of this Honorable Court's jurisdiction. That issue is discussed at length in the petition. Although the Louisiana Fourth Court of Appeal reversed and remanded this case for trial, the Association agrees with the petitioner that this Court has jurisdiction under the exceptions recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The application of those exceptions is particularly appropriate here, because the very purpose of the immunity granted by the LHWCA is to avoid not only civil damages but civil litigation. Requiring LHWCA employers to fully litigate civil actions before obtaining immunity defeats one of the principal purposes of that immunity.

SUMMARY OF ARGUMENT

By judicial alchemy, the Louisiana Fourth Court of Appeal has attempted to transmute a claim that a co-employee stabbed Frank Taylor into a claim that Transocean Terminal Operators, Inc. (TTO), Taylor's employer, committed an "intentional tort." *Taylor v. Transocean Terminal Operators, Inc.*, 785 So. 2d 860, 861 (La. App. 2001). Upon that flawed premise the Louisiana Court of Appeal ruled that such an injury is not subject to compensation under the LHWCA and that the immunity against civil liability granted to TTO by Section 5(a) of the LHWCA, 33 U.S.C. § 905(a) does not apply to the postulated cause of action. Every federal circuit court that has spoken to the issue has ruled to the contrary: a claim by an LHWCA worker for an intentional injury by a co-employee is within the coverage of the LHWCA. Therefore, that is the exclusive liability of TTO. The departure of the Louisiana Fourth Court of Appeal from this settled federal principle is an important consideration for granting the petition for certiorari under Supreme Court Rule 10(b).

The plaintiff's claim is straightforward and simple. Frank Taylor was a longshoreman employed by TTO, an employer unquestionably covered by the LHWCA. Taylor alleged he was stabbed on the job by a co-employee. Taylor explicitly alleged both he and the co-employee were in the course and scope of their employment for TTO. Taylor's ***sole*** claim is that TTO is vicariously liable for the intentional acts of the co-employee. The Louisiana Fourth Circuit Court of Appeal has mistakenly equated that claim with a claim that TTO intentionally injured Taylor. Both federal and state courts recognize that the two types of claims are fundamentally different. An intentional injury by a corporate employer

requires proof of an intentional act by the corporation itself, or by its alter ego. There is no such allegation here. An intentional injury committed by a low-level employee, or even by a supervisory employee, is not an intentional injury by the corporation.

The Louisiana Fourth Court of Appeal has misconceived the nature of Taylor's claim and has misconstrued the LHWCA. Its rulings have introduced two basic errors into this exclusively federal domain: (1) an intentional injury inflicted by one longshoreman against another is not compensable; and (2), a claim of vicarious liability based upon such an injury is an "intentional injury" by an LHWCA employer that is not subject to the immunity granted by the LHWCA. The result of these rulings significantly impact claims under the LHWCA by (1) denying injured employees compensation to which they may be entitled, and (2) denying immunity to employers to which they are entitled.

The Louisiana Court of Appeal's effort to transmute Taylor's claim into gold is as futile as the efforts of the alchemists of old. The petition for certiorari should be granted and these errors should be corrected.

ARGUMENT

I.

AN INTENTIONAL INJURY INFLICTED BY A LONGSHOREMAN AGAINST A CO-EMPLOYEE IS COMPENSABLE UNDER THE LHWCA

It is beyond debate that if the injury alleged by Frank Taylor is compensable under the LHWCA, TTO is immune from civil liability. Section 5(a) of the LHWCA, 33 U.S.C. § 905(b), could not be more clear: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer. . . ." The central question then is whether an intentional injury inflicted upon one LHWCA employee by a co-employee, arising out of and in the course of their employment[4], is compensable. Federal courts addressing

---

4. Taylor himself explicitly alleged that the injury arose out of and in the course of both his employment and that of his assailant, as stated at the outset of the Louisiana appellate court's decision:

> The plaintiff, who is a longshoreman, was stabbed while at work, by a fellow employee. The plaintiff alleges that the stabbing was work-related, i.e., within the course and scope of his and the fellow-employee's employment, and that, therefore, his employer is vicariously liable.

785 So. 2d 860, at 861. Indeed, had the assault not arisen out of the work, there would be no basis for claiming vicarious liability. As discussed *infra*, a claim of vicarious liability is not a claim of intentional injury ***by the employer***. Any "vicarious" liability of TTO is compensable only under the LHWCA.

these uniquely federal issues[5] speak with one voice, and their message leaves no doubt about the error of the Louisiana Court of Appeal's decision.

Subsection 2(2) of the LHWCA defines "injury" in pertinent part as follows:

> The term "injury" means accidental injury or death arising out of and in the course of employment . . . and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Applying that definition, every federal decision on point recognizes that an intentional injury inflicted by an employee

---

5. It is familiar history that the LHWCA was enacted in response to decisions from this Court, beginning with *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), that the states were constitutionally unable to legislate remedies for maritime workers injured over navigable waters. One of the chief concerns impelling those decisions was the need for national uniformity in the law governing maritime workers. Although state courts have jurisdiction to decide issues of LHWCA rights and liabilities, the need for uniformity is paramount and can be achieved only by this Court's review of state court pronouncements. It is important to understand that the Louisiana Court of Appeal's decision is based ***solely*** on its interpretation of the LHWCA. It is not based on any "twilight zone" doctrine. *See Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249 (1942). The "twilight zone" no longer exists in Louisiana because, effective January 1, 1990, the Louisiana workers' compensation statute exempts from its coverage a claim covered under the LHWCA: "No compensation shall be payable in respect to the disability or death of any employee covered by the . . . Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions. . . ." LSA – R.S. § 23:1035.2 (West 1998).

covered by the LHWCA against a co worker is an "injury" and is compensable under the LHWCA, where the injury arose out of and in the course of employment:

> This court has held that an unexplained attack upon a workman by a stranger, on the employer's premises, arose out of the employment. *Hartford Accident & Indemnity v. Hoage*, 66 App. D.C. 160, 85 F.2d 417. A fortiori if, as here, a quarrel over work leads one employee to strike another, the resulting injury arises out of employment. A long line of cases so hold. (Citations omitted [6]).

---

6. Two of the decisions cited by the court pre-date the enactment of the LHWCA in 1927, *Rydeen v. Monarch Furniture Co.*, 240 N.Y. 295, 148 N.E. 527 (1925); and *Verschleiser v. Joseph Stern Son, Inc.*, 229 N.Y. 192, 128 N.E. 126 (1920). Those decisions applied the New York workers' compensation act and held that injuries sustained in fights between co-workers were "accidental" for the viewpoint of the employer and were hence compensable. The LHWCA, enacted in 1927, was patterned after the New York act, *Uglem v. Foss Launch & Tug Co.*, 541 F.2d 1378, 1382 (1976), and New York decisions pre-dating the enactment of the LHWCA are instructive in interpreting the latter statute. *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 276 (9th Cir. 1956). Later decisions under New York law are likewise instructive. Before the LHWCA's jurisdiction was extended landward the Second Circuit, applying the New York act, ruled that an assault by one longshoreman against his co-worker was covered by the New York workers' compensation act and, accordingly, the employer was immune from civil liability under the act. *Whittington v. Moore McCormack Lines, Inc.*, 196 F.2d 295, 296 (2d Cir. 1952). Importantly, the court also recognized the distinction between an intentional injury by a co-employee and an intentional injury ***by the employer***:

> Since this assault was not made at the direction or instigation of the employer, the resulting injury was, insofar as the

(Cont'd)

Maryland Casualty Co. v. Cardillo, 69 App. D.C. 199, 99 F.2d 432, 434-35 (1938).

> [I]t makes little difference whether the fighting is by fellow employees or strangers to the work or what is the immediate occasion for the dispute. * * * It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes. (Footnotes omitted).

Hartford Accident & Indem. Co. v. Cardillo, 72 App. D.C. 52, 112 F.2d 11, 15-16, *cert. denied*, 310 U.S. 649 (1940).

> The finding that "the employment * * * was responsible for the assault" is equivalent to a finding that the injury was "caused by the willful act of a third person directed against an employee because of his employment." The statute makes such an injury compensable. (Footnote omitted).

Penker Const. Co. v. Cardillo, 73 App. D.C. 168, 118 F.2d 14, 15 (1941)).

(Cont'd)

> appellant was concerned, something neither intended nor expected. It was, therefore, "accidental" within the meaning of the Compensation Act. (Citations omitted).

Id. at 296. *Accord, Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69, 71-72 (1949) (injury sustained by longshoreman in a fight with a fellow longshoreman was compensable under the Massachusetts workers' compensation act, even where the claimant struck the first blow).

> If, in the course of employment, a quarrel over work leads one employee to injure another, the injury arises out of the employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act. (Citations omitted).

Southern Pac. Co. v. Sheppeard, 112 F.2d 147, 148 (5th Cir. 1940), *aff'g*, 29 F. Supp. 376, 378 (S.D. Tex. 1939).

The Benefits Review Board, the administrative agency charged with adjudicating LHWCA claims, also has ruled that injuries sustained during altercations at work are compensable under the LHWCA. *Williams v. Healy-Ball-Greenfield*, 15 Ben. Rev. Bd. Serv. 489, 492 (1983) (fatal shooting of one employee and injury to another employee by co-employee was compensable); *Kielczewski v. Washington Post Co.*, 8 Ben. Rev. Bd. Serv. 428, 431 (1978) (injury sustained during fight arising out of work was compensable).

The Louisiana Court of Appeal did not acknowledge, much less attempt to reconcile its decision with, the foregoing federal decisions, each of which ruled definitively that an injury sustained in a fight between LHWCA employees is compensable under the Act. Instead, the Louisiana Court of Appeal sought guidance from the Louisiana workers' compensation statute and from Louisiana decisions interpreting that statute:

> The notion that a claim for an intentional tort committed by an employer is an exception to a statutory exclusive remedy compensation scheme is familiar in the context of Louisiana worker's compensation law. Louisiana's worker's compensation statute provides that it does not affect

> the liability of the employer for civil liability resulting from an intentional act. La. R. S. 23:1032B.

785 So. 2d at 862.

The Louisiana Court of Appeal's attempt to draw a parallel between the Louisiana workers' compensation statute and the LHWCA was bound to produce error because the two statutory schemes diverge. The Louisiana statute referred to by the Louisiana Court of Appeal provides:

> Nothing in this Chapter shall affect the liability of the employer, of any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

LSA -- R.S. 23:1032B (West 1998).

There is no counterpart in the LHWCA. The specific provisions of the LHWCA are directly to the contrary. The federal decisions discussed above make it clear that where one LHWCA employee intentionally injures another, the assailant is viewed as a "third party" within the contemplation of Section 2(2) of the LHWCA. That is not true under Louisiana law because of the explicit language of the statute.

There is another fundamental difference between the Louisiana statute and the LHWCA. Under the Louisiana statute, as construed by Louisiana courts, there is a permissible civil action against the employee inflicting an intentional injury ***and against the employer on vicarious***

liability grounds. *Jackson v. Frisard*, 685 So. 2d 622, 627-28 (La. App.) (intentional injury of one state trooper by another state trooper gave rise to a claim of vicarious liability against the employer, the State of Louisiana), *writ denied*, 689 So. 2d 1386 (La. 1997), and *writ denied*, 689 So. 2d 1387 (La. 1997).

The LHWCA contains only one provision barring compensation where it is otherwise allowable:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

Section 3(c), 33 U.S.C. § 903(c). To those two grounds the Louisiana Court of Appeal would add another reason for non-coverage, an intentional injury by a co-employee. That judicial amendment is beyond the power of the Louisiana court or any court.

Moreover, the rationale used by the Louisiana Court of Appeal to create that exception is itself hopelessly flawed. According to the Louisiana Court of Appeal, a claim that one employee intentionally injured another employee, coupled with a claim of vicarious liability of the employer, is equivalent to a claim that the employer intentionally injured the employee. The court's confusion reaches its zenith when it assures its view "is in accord with the mainstream of worker's compensation law." 785 So. 2d at 864. Quite to the contrary, as discussed immediately below, the court's concept of an intentional injury ***by the employer*** is an aberration that has been rejected time and again by the great weight of authority. The authorities rejecting the Louisiana appellate

court's view includes one of the principal authorities the Louisiana Court of Appeal purported to follow, LARSON'S WORKERS' COMPENSATION LAW.

II.

A CLAIM THAT ONE LONGSHOREMAN INJURED A CO-EMPLOYEE IS NOT A CLAIM OF INTENTIONAL INJURY BY THE LHWCA EMPLOYER AND IS WITHIN THE IMMUNITY GRANTED TO THE EMPLOYER BY THE LHWCA

After correctly recognizing that the only claim lodged by Frank Taylor is that he was stabbed by a fellow longshoreman and that TTO is therefore vicariously liable, the Louisiana Court of Appeal mistakenly characterized the claim as alleging "an intentional tort by the employer." 785 So. 2d at 863. Upon that essential mistake the Louisiana Court of Appeal based its decision that the LHWCA does not shield an employer from an "intentional tort" committed by the employer. The Louisiana Court of Appeal believes that its characterization of the claim is within the "mainstream of worker's compensation law," and cites authorities such as LARSON'S WORKERS' COMPENSATION LAW and several federal decisions as supposedly supporting that characterization.[7] Those authorities actually teach the opposite.

---

7. Although the Fourth Court of Appeal's views are not within the mainstream of compensation law nationally, the court's views are within the mainstream of Louisiana jurisprudence. In *Malbrough v. Halliburton Logging Serv., Inc.*, 710 So. 2d 1149, 1151-52 (La. App.), *writ denied*, 720 So. 2d 1217 (La. 1998), the court ruled that where one employee was allegedly injured intentionally by another employee on a fixed platform on the outer

(Cont'd)

LARSON'S states the correct rule, which is by far the weight of authority:

> Intentional injury inflicted by the employer in person on an employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that such an intentional act was an "accidental" injury and so under the exclusive provisions of the compensation act. The same result may follow when the employer is a corporation and the assailant is, by virtue of control of ownership, in effect the alter ego of the corporation. ***But when the intentional injury is committed by a co-employee the better rule is that an action in damages will not lie against the employer merely because the co-employee occupied supervisory status in relation to the claimant.***

6 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, Ch. 103, p. 103-1 (2000) (emphasis added). Taylor has not alleged that TTO, or an alter ego of TTO, or even a supervisory employee of TTO intentionally injured him. The Louisiana Court of Appeal's attempt to

---

(Cont'd)

Continental Shelf (where the LHWCA is applied via the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b)), the immunity provided by the LHWCA did not preclude a suit by the injured employee against the co-employee. The Fourth Court of Appeal has taken this erroneous ruling one step further by concluding that a suit against the employer on vicarious liability grounds likewise escapes the immunity of the LHWCA. It is obvious that the Louisiana courts will continue to hold these views until corrected by this Court.

equate a claim of vicarious liability with an intentional injury by TTO is a misconception of elementary legal principles.[8]

One need only examine the federal decisions on which the Louisiana appellate court relies to see the court's illogic. All but one of those decisions involved a claim that ***the employer itself*** committed an intentional act or omission: *Johnson v. Odeco Oil & Gas Co., Inc.*, 679 F. Supp. 604 (E.D. La. 1987) (claim that the corporate employer failed to timely evacuate an offshore oil platform in the face of a hurricane), *aff'd*, 864 F.2d 40 (5th Cir. 1989); *Houston v. Bechtel Assocs. Professional Corp.*, D.C., 522 F. Supp. 1094 (D.D.C. 1981) (claim that the corporate employer failed to provide proper protection from silica dust); *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981) (claim that the corporate employer failed to warn of the dangers of asbestos dust). None of those decisions involved a claim of an intentional injury inflicted by a co-employee. In the one decision cited by the Louisiana appellate court that did address such a claim, *Sharp v. Elkins*, 616 F. Supp. 1561 (W.D. La. 1985), the court sensibly ruled that a claim of intentional injury ***against the co-employee*** was barred by

---

8. It is surpassing odd that the Louisiana Court of Appeal would find comfort in LARSON'S. It is the view of that preeminent authority on workers' compensation that Louisiana jurisprudence is utterly chaotic on "intentional injuries" that escape the bar of workers' compensation immunity. Discussing the aftermath of *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981), the principal Louisiana decision relied upon by the Fourth Court of Appeal in this case, LARSON'S says: "But subsequent cases extracted from *Bazley* the 'substantial certainty' test of intention, and, as a result, the reports are littered with fact situations, not always successful of course, for some of which 'preposterous' would be too charitable a word." 6 LARSON'S, *supra*, § 103.05[4], pp. 103-30 – 103-31.

the exclusivity provisions of the LHWCA because the alleged injury was compensable. In so ruling, the court explicitly stated that a "third person" within the meaning of Section 2(2) of the LHWCA includes a fellow employee: "Thus, a fellow employee could be deemed a 'third person' under § 902(2). . . ." *Id.* at 1565-66.

As the petitioner has correctly observed, each of the federal decisions cited by the Louisiana Court of Appeal ultimately found no basis for an intentional injury claim. Consequently, any discussion in those cases about whether the LHWCA immunity would apply in a case where the employer ***itself*** intentionally inflicted an injury was a purely academic discussion. There simply is no decision from any federal court applying an exception to the LHWCA's grant of immunity based on an intentional injury by an employer. But, as discussed *supra*, there are several federal decisions, ignored by the Louisiana Court of Appeal, holding that a claim of intentional injury by a co-employee is compensable under the LWHCA.

Even when state law may recognize an intentional injury exception to the exclusivity provided by state workers' compensations statutes, the great majority of courts require the corporate employer itself, or its alter ego, to have inflicted the intentional injury. A perfect example is *Daniels v. Swofford*, 286 S.E.2d 582 (N.C. App. 1982). The plaintiff there claimed the president of the company kicked her in anger. There was no allegation the president was acting as the alter ego of the corporation. Citing LARSON'S, the court found no basis for an intentional injury claim against the employer:

> When the intentional injury is committed by a supervisory employee rather than an employee who is the alter ego of the corporation, the majority rule is that an action in damages will *not* lie against the employer.

Id. at 585 (emphasis in original). The jurisdictions agreeing with that principle are legion and are collected in 6 LARSON'S, Digest to Ch. 103, §§ 103.06D, 103.07D, pp. D103-89 – D103-103.

CONCLUSION

There is no legal basis for finding a claim of intentional injury by TTO, and there is no ground for abrogating the immunity granted to TTO by the LHWCA. The alleged injury to Frank Taylor is compensable under the LHWCA, and TTO's liability under that statute is exclusive. The Court should grant the petitioner's request for review and should reverse the decision of the Louisiana Fourth Court of Appeal and reinstate the judgment of the trial court.

Respectfully submitted,

GRAY H. MILLER
Counsel of Record
STEVEN L. ROBERTS
FULBRIGHT & JAWORSKI L.L.P.
Attorney for Amicus Curiae
1301 McKinney Street
Suite 5100
Houston, Texas 77010
(713) 651-5151

APPENDIX

APPENDIX — LIST OF MEMBERS OF SIGNAL MUTUAL INDEMNITY ASSOCIATION LTD, EFFECTIVE OCTOBER 5, 2001

ACADIAN SHIPYARD, INC.
ADMIRAL MARINE CONSTRUCTION CORP.
AMBOY AGGREGATES
AMERICAN GRAIN TRIMMERS INC.
AMERICAN MARITIME SERVICE OF NEW YORK
AMERICAN STEVEDORING, INC.
ANTILLEAN MARINE SHIPPING CORP.
ASSOCIATED NAVAL ARCHITECTS INC.
ATLANTIC CONTAINER SERVICE, INC.
ATLANTIS SUBMARINES HAWAII, L.P.
BAYOU STEEL CORPORATION
BIEHL INTERNATIONAL CORPORATION
BIRDSALL, INC. (TROPICAL SHIPPING & CONSTRUCTION)
BLOUNT/BARKER SHIPBUILDING LLC
BRADFORD MARINE, INC.
BRADY MARINE COMPANY, INC.
BROWARD YACHTS, INC., DBA BROWARD MARINE
CADDELL DRY DOCK & REPAIR CO., INC.
CALLENBERG ENGINEERING, INC.
CANAL BARGE COMPANY, INC.
CHANNEL SHIPYARD INC. AND LYNCHBURG SHIPYARD, INC.
CHRISTINA SERVICE COMPANY
CLEAN WATER OF NEW YORK, INC.
COASTAL DECKING INC.
COASTAL GUNITE CONSTRUCTION CO.
COASTAL MARINE SERVICES, LLC
COASTAL TOWING, INC.
COASTAL TRANSPORTATION, INC.

Appendix

COLUMBIA COASTAL TRANSPORT LLC
COMPLETE DIVING SERVICES, INC.
CORN ISLAND SHIPYARD
CORROSION CONTROL SPECIALISTS, INC.
CROFTON DIVING CORPORATION
CROWLEY MARITIME CORPORATION
D W ALLEN MARINE SERVICES INC.
DAVIS BOAT WORKS, INC. (WAGNER MARITIME)
DELTA MARINE INDUSTRIES, INC.
DENISON HYDRAULICS, INC.
DIX FAIRWAY TERMINALS LLC
DIX INDUSTRIES INC.
DUROCHER DOCK & DREDGE, INC.
EARL INDUSTRIES, LLC (DIGITAL SYSTEMS RESEARCH)
EASTERN TECHNICAL ENTERPRISES
ELLER & COMPANY, INC.
ELLER-ITO STEVEDORING CO., LLC
ENSCO INTERNATIONAL, INC.
EPSILON SYSTEMS SOLUTIONS, INC.
FEDERAL MARINE TERMINALS
FLORIDA STEVEDORING INC. AND FAROVI SHIPPING CORP.
FRASER SHIPYARDS, INC.
GENERAL OFFSHORE CORP.
GENERAL SHIP REPAIR CORPORATION
GLOBAL TERMINAL & CONTAINER SERVICES, INC.
GRASSO CORPORATION, ET AL.
GREAT LAKES ASSOCIATES, INC.
GREAT LAKES DREDGE & DOCK COMPANY
GREAT LAKES TOWING
GREAT LAKES TRANSPORTATION

Appendix

GREYSTAR CORPORATION
GUAM INDUSTRIAL SERVICES, INC.
GULF MARINE REPAIR CORP.
GULF TERMINAL INTERNATIONAL
HARBOR INDUSTRIAL SERVICE CORP.
HAWAII STEVEDORES, INC.
HENDRY CORPORATION
HOUSTON MOORING COMPANY
HOWLAND HOOK TERMINALS, INC.
HUDSON DRYDOCK, INC.
HVIDE MARINE INCORPORATED (SEABULK INTERNATIONAL)
INDUSTRIAL MARINE SERVICE INC.
INTERNATIONAL FLOORING & PROTECTIVE COATING, INC.
INTERNATIONAL SHIP REPAIR & MARINE SERVICE INC.
J WILLIS SMITH & BROTHER, INC.
J. H. STEVEDORING OF DELAWARE
JAMES J. FLANAGAN SHIPPING CORPORATION
JEMM INDUSTRIES, INC.
JONES BOAT YARD
KERNEY BAYONNE SHIP REPAIR, INC. AND FLORIDA MACHINE
KEYSTONE SHIPPING CO.
KINGFISHER MARINE SERVICE, INC.
KIRBY CORPORATION
KNIGHT & CARVER YACHT CENTER
KVAERNER PHILADELPHIA SHIPYARD, INC.
LAMORTE BURNS & CO., INC.
LBC PETROUNITED TERMINALS, INC.
LIGHTSHIP GROUP

LLOYD'S REGISTER OF SHIPPING
LOGISTEC, INC. (MARINE PORT TERMINALS)
LONG BEACH CONTAINER TERMINAL, INC.
LYON SHIPYARD INC.
M. J. HOGAN COMPANY, INC.
M. J. RUDOLPH CORPORATION (TAMPA BAY STEVEDORES)
MACGREGOR (USA) INC.
MADCON CORPORATION
MAERSK, INC.
MAIN INDUSTRIES, INC.
MARINE CONTRACTING CORPORATION
MARINE HYDRAULICS INTERNATIONAL, INC.
MARINE REPAIR SERVICES, INC.
MARINE TRANSPORT LINES, INC.
MARINETTE MARINE CORPORATION
MARITRANS INC.
MASTER BOAT BUILDERS INC.
MASTER MARINE
MATSON TERMINALS (NAVIGATION) CO. INC.
MAY SHIP REPAIR CONTRACTING CORPORATION
MCALLISTER TOWING & TRANSPORTATION COMPANY, INC.
MCGINNIS INC.
MERRILL STEVENS DRYDOCK COMPANY
METAL TRADES, INC.
METRO MACHINE CORPORATION
MID-ATLANTIC COATINGS
MID-FLORIDA FREEZER WAREHOUSES, LTD.
MIDWEST ENERGY RESOURCES COMPANY
MISSOURI DRY DOCK & REPAIR CO.
MOON ENGINEERING COMPANY INC.

MORAN TRANSPORTATION COMPANY
MOTOR SERVICES HUGO STAMP INC.
MPL/SEALAND
NATIONAL CARGO BUREAU, INC.
NATIONAL MAINTENANCE & REPAIR, INC.
NAVIOS SHIP AGENCIES INC.
NEWPORT TERMINALS, LLC
NICHOLS BROTHERS BOAT BUILDERS INC.
NORTH AMERICAN SHIP BUILDING & EDISON CHOUEST OFFSHORE
NOVOLOG BUCKS COUNTY
OCEANIC STEVEDORING COMPANY, INC.
OFFSHORE SPECIALTY FABRICATORS & OFFSHORE EXPRESS
ORION CONSTRUCTION, INC.
P. C. PFEIFFER & CO. INC.
PACIFIC CRANE MAINTENANCE
PACIFIC MARINE MAINTENANCE
PAIGE FLOOR COVERING SPECIALISTS
PARKER TOWING COMPANY, INC.
PARKER DRILLING
PENN TERMINALS, INC. AND PENNSYLVANIA SHIPBUILDING
PETROLEUM SERVICE CORPORATION
PORT AMHERST, LTD
PORT CRANE MAINTENANCE COMPANY LLC
PORT OF MIAMI TERMINAL OPERATING COMPANY, L.C.
PRIDE PETROLEUM SERVICES, INC.
R. O. WHITE & COMPANY, INC.
REINAUER TRANSPORTATION COMPANIES
REX PAINTING, INC.

RLN INDUSTRIES
ROBERT E. DERECKTOR
RODRIGUEZ BOAT BUILDERS, INC.
RUSH JOHNSON ASSOCIATES, INC.
SALMONS DREDGING INC.
SALVAGE ASSOCIATION, LTD.
SCHAEFER STEVEDORING, INC.
SEACOR SMIT INC.
SEAWARD MARINE SERVICES, INC.
SEMCO MARITIME, INC.
SERODINO, INC.
SHORELINE FOUNDATION
SIGNAL CORPORATION
SIMPSON AND BROWN, INC.
SOUTH STEVEDORING, INC.
SOUTHERN STEVEDORING CO. INC.
SOUTHWEST SHIPYARD, L.P.
SPENCER BOAT COMPANY INC.
STEINER SHIPYARD
STEWART CONSTRUCTION CO. INC.
STRACHAN SHIPPING CO.
SUBAQUEOUS SERVICES, INC.
TAMPA BAY SHIPBUILDING & REPAIR CO.
TAMPA PILOTS ASSOCIATION
TECHNICO CORPORATION
TEXAS MOORING INC.
THAMES SHIPYARD
THE FLORIDA DRAWBRIDGE COMPANY
TORCH ENERGY ADVISORS, INC.
TRANSTAR DULUTH MISSABE & IRON RANGE RAILWAY CO.
TRANSTAR MOBILE RIVER TERMINAL COMPANY

TRANSTAR PITTSBURGH & CONNEAUT DOCK CO.
TRANSTAR UNION RAILROAD COMPANY
TRANSTAR USS GREAT LAKES FLEET
TRANSTAR WARRIOR & GULF NAVIGATION CO.
TRANSTAR, INC.
TRICO MARINE OPERATORS
TRITON MARINE CONSTRUCTION CORPORATION
U. S. SHIP MANAGEMENT, INC.
UMS/SEALAND
UNITED STATES MARINE REPAIR
(SOUTHWEST MARINE)
UNIVERSAL MARITIME SERVICE CORPORATION
VAN OMMEREN USA, INC. & OMMEREN
SHIPPING USA, INC.
VIRGINIA INTERNATIONAL TERMINALS, INC.
W. F. MAGANN CORPORATION
WALASHEK INDUSTRIAL & MARINE, INC.
WALASHEK SHIPYARD, INC.
WATERFRONT SERVICES, INC.